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Case No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1994

AMNON CHARASH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA COURT OF APPEALS

Second Appellate District

PETITION FOR WRIT 0F CERTIORARI

AMNON CHARASH
Petitioner In Pro Per
13001 Chandler Blvd.
Sherman Oaks, CA 91401
Telephone: (818) 994-2266

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appeals Court was required to reverse petitioner's conviction and the trial court's constitutionally-erroneous decision to renege on the previously-approved plea agreement (which provided for no incarceration) thereby depriving Petitioner of liberty and property without due process of law.

2. Whether the Appeals Court was required to reverse Petitioner's conviction since Collateral Estoppel barred perjury prosecution given that the issue of Petitioner's alleged perjury was adjudicated in Petitioner's favor in a prior civil action.

3. Whether the Appeals Court was required to reverse the trial court's order imposing a huge, $10,000 restitution fine in violation of the Eight Amendment of the U.S. Constitution and of Article I, Section 17 of California Constitution in that the fine was excessive and the punishment was cruel and unusual and grossly out of proportion to the crime's severity.

4. Whether the Appeals Court was required to reverse Petitioner's conviction since the trial court denied him his due process right to an eligibility hearing (pursuant to Government Code Sec. 68511.3 and Rule 985(f) of the California Rules of Court) which is a condition precedent to the perjury prosecution.

5. Whether the Appeals Court was required to reverse Petitioner's conviction since the prosecutor engaged in a prejudicial misconduct by improperly and repeatedly appealing to the jury's pecuniary interest.

6. Whether the Appeals Court was required to reverse Petitioner's conviction since his trial counsel's failure to make a motion based on discriminatory prosecution as provided for in Murgia v. Municipal Court (1975) 15 Cal. 3d 286 constituted ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution and Article I, Sec.15 of the California Constitution.

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GROUNDS FOR JURISDICTION

1. The trial court Judgment of conviction was entered June 14, 1993; affirmed by Court of Appeals December 2, 1994; review by the California Supreme Court denied March 1, 1995.

1. The statutory provision believed to confer on this Court jurisdiction to review the final state opinion in question by Writ of Certiorari is Title 28 U.S.C. §1257(a) [Text in Appendix].

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:
U.S: Fifth, Sixth, Eighth and Fourteenth Amendments
California: Article I, Sections 7, 15 and 17
Federal Statutes:
28 U.S.C. §1257(a)
California Statutes:
Government Code §13967 and §68511.3
Penal Code §995 and §1192.5

[Pertinent texts are set forth in the Appendix]

STATEMENT OF THE CASE

The following facts are material to the consideration of the questions presented. The pertinent quotations of the larger portions of the record relied upon (by reference to "APP" in the ARGUMENT section, infra) are included in the Appendix under "Pertinent Quotations".

The Information was filed on June 25, 1992, charging Petitioner with two counts of perjury on applications for a filing fee waiver (in connection with an unrelated civil case which he had filed) and one count of altering a court file. On the fee waiver applications Petitioner gave literally true responses and made gratuitous and immaterial statements not required by the application. On August 27, 1992 Petitioner pled not guilty. Three years before that, the defendants in the civil case, opposing Petitioner (who was the plaintiff), alleged a perjury in Petitioner's fee waiver application as their defense. The civil court reviewed Petitioner's financial records and condition and found that he was fully entitled to the fee waiver and he had committed no perjury. This adjudication in Petitioner's favor barred any further prosecution on the same issue. Violating his Federal constitutional right to due process, the State, ignoring the estoppel, commenced criminal prosecution of Petitioner. This violation of due process was timely raised at trial, on the record, and at the appellate process.

Further, in 1990, yet another court, hearing the civil case, arbitrarily revoked Petitioner's fee waiver without the mandatory eligibility hearing required by Court Rules, Rule 985(f) and Government Code, §68511.3, thereby denying him his Federal constitutional rights to due process. Said hearing was a condition precedent to any perjury prosecution and, yet, the State proceeded to prosecute Petitioner without ever giving him the benefit of the required hearing. This Federal issue was properly raised on the record during trial and in the reviews at the appellate courts.

On May 21, 1993, prior to the trial, a plea agreement was reached between Petitioner's counsel and the prosecutor in which Petitioner would plead "no contest" under People v. West (1970) 3 Cal. 3d 595 to the count of altering a court file, the perjury counts were to be dismissed, there would be no incarceration nor fine but only probation and possible community service. The trial court approved the plea agreement and ordered the prosecutor to "proceed" taking down the plea. On the record Petitioner voluntarily responded

"yes" to the prosecutor's question whether he wanted *"to enter a plea of no contest to that charge"* (altering a court file). Petitioner then proceeded to add, that despite his innocence, he agreed to such a plea because of his poor health and the suffering of his wife and children (according to People v. West, Petitioner was entitled to maintain his innocence while pleading no contest). That angered the trial judge who snapped: *"He is denying his guilt..."* and immediately ordered the start of a trial ignoring the approved plea agreement. On May 24, 1993, before the trial, Petitioner attempted again to enter his plea pursuant to the agreement but the trial judge refused to hear him. In reneging on the previously-approved plea agreement the trial court violated Petitioner's Federal constitutional rights under the Fifth and Fourteenth Amendments and this Honorable Court's decision in Santobello v. New York (1971) 404 US 257. This Federal question was properly raised in the appellate courts.

A day before the trial the prejudiced trial judge revoked without grounds Petitioner's O.R. status and ordered him jailed without bail despite his perfect appearance record. Petitioner was in jail throughout the trial period, unable to assist in his defense. His daily motions for bail were denied even though bail is a statutorial right for a non-capital offense.

On several occasions during the trial, the prosecutor was engaging in a prejudicial misconduct, appealing to the pecuniary interest of the jury as taxpayers and distorting evidence. He inflamed the jury's passion against Petitioner, depicting him as a person who took their (taxpayer's) money by not paying a $41 filing fee.

Petitioner contends that he was selected for prosecution. One of his trial counsel's duties was to move for discovery and dismissal pursuant to the claim of discriminary prosecution as he was instructed by the judge who heared Petitioner's earlier motion to dismiss. The trial counsel's failure to make said motion, raise important objections during trial and take essential steps in this case constituted an ineffective assistance of counsel, depriving Petitioner of his Federal constitutional rights under the Sixth and Fourteenth Amendments. This Federal question, too, was timely raised in all the appellate stages.

On May 28, 1993 the jury found Petitioner guilty of perjury and an alteration of a court file. Despite his perfectly clean, non-violent record, the overwhelming support from the community and a highly favorable probation report (which

described Petitioner as "a progressive citizen of society" and recommended only probation and $100 fine), the trial judge, on June 14, 1993, imposed an unheard of term of two years in State prison and a $10,000 fine for such a minor offense.

The $10,000 fine was imposed without any judicial inquiry as to Petitioner's ability to pay it as mandated by Government Code §13967. In imposing this grossly unproportional fine, the trial judge admitted that she was doing so "*even though the economic gain* [to Petitioner] *was small...*" ($41). The fine was clearly excessive and a cruel and unusual punishment in violation of Petitioner's Federal constitutional rights under the Eighth and Fourteenth Amendments. This Federal question was properly raised in the appellate courts.

Petitioner timely appealed to the California Court of Appeals, Secomd Appellate District. On December 2, 1994 that court affirmed the judgment of the trial court. A timely Petition for Review to the California Supreme Court was denied without comment on March 1, 1995 (all texts are in the Appendix).

Petitioner served a two-year sentence in State prison for this non-violent offense (to save a $41 filing fee) which he never committed as he was legally entitled to the fee waiver.

ARGUMENT

Certiorari should be granted for the reasons set forth below. This Petition presents important issues of Federal constitution and law which were unequivocally decided by this Honorable Court on several occasions, but the opinions below (in the case at bar) conflict with the applicable decisions of this Court, other courts, state statutes and state and Federal constitutions.

1. THE APPEALS COURT WAS REQUIRED TO REVERSE PETITIONER'S CONVICTION AND TRIAL COURT'S CONSTITUTIONALLY-ERRONEOUS DECISION TO RENEGE ON THE PREVIOUSLY-APPROVED PLEA AGREEMENT (WHICH PROVIDED FOR NO INCARCERATION) THEREBY DEPRIVING PETITIONER OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

It is well established that judicial approval is required to any plea bargain worked out by defense and prosecution (Penal Code Sec. 1192.5; People v. West, supra). It is respectfully submitted that the appellate court erroneously concluded that the trial court could not have approved the terms of the plea agreement reached between Petitioner's counsel and the prosecutor in that it did not yet know what the terms were (App. B). However, a review of the record reveals that the trial court

did know the terms of the agreement, found them acceptable, confirmed the prosecutor's willingness to accept said terms, and then indicated its approval to have the agreement entered on the record. In fact, on May 20, 1993, the day before the parties put the plea agreement on the record, the court stated:

"I heard the prosecutor tell your attorney that he would not ask for state prison. And so I certainly would go along with that, honor anything like that" (RT 7.), accepting the plea. Then, the court indicated its further accceptance of the agreement:

"If you want to enter an open plea to count II I will take that tomorrow, unless you want to do it now and come back for sentencing tomorrow or Monday..." (RT 8.)

The exact terms of the plea bargain were stated between Petitioner's counsel and deputy D.A. and approved by the court as outlined by Petitioner's counsel, Bruce Hill, in his Declaration under penalty of perjury which was previously filed with the State Appeals (in Hab. Corpus petition) and Supreme Courts. Specifically, attorney Hill declared that on May 21, 1993:

"...I had further discussions with D.A. and the court relative to a disposition. Deputy D.A. Schuit agreed to accept a felony plea to Count II (altering a court file) with an agreement that there would be no jail time involved. ***The court agreed to the disposition*** *but reserved the right to make further orders, possibly involving community service. Mr. Charash agreed to the disposition in the prisoner lock up adjacent to the courtroom. He was brought into the court for the purpose of entering his plea".* (Emphsis added.)

In the courtroom, Mr. Hill advised the court of Petitioner's wish to enter a 'no contest' plea to Count II, the judge confirmed the prosecutor's agreement to the plea and accepted the plea the third time, the prosecutor read the elements of Count II and asked for a plea, Petitioner entered the plea as agreed and added his reasons for agreeing to it. The judge became angry as Petitioner claimed his innocence despite his plea, and abruptly and improperly refused to follow through with the plea and ordered a trial started. (for record, see APP. 1). The record reflects that on May 21, 1993, when the court told the parties "you may proceed" (meaning the court accepts the agreement and they can proceed to put it on the record), the court already knew that Petitioner would enter a no contest plea to Count II in exchange for the prosecutor's promise of no incarceration. This, in conjunction with the court's prior

approval of the terms of the agreement and its earlier utterings that it would *"certainly go along with that, honor anything like that"*, clearly indicated that it assented to the agreement between the parties.

However, the court refused to follow through with the plea agreement only because it was irritated with Petitioner's entry of his reasons for his plea and his protestation of innocence (all of which were permitted under People v. West, supra). *A defendant need not admit culpability. He may, in fact, enter a plea of guilty even though he protests his innocence.* People v. watts (1977) 67 Cal.App. 3d 173.

Petitioner attempted to enter a plea again after the jury was admonishes but the judge refused to hear him. (see APP. 2).

In Santobello, supra, the U.S. Supreme Court held: *"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so it can be said to be a part of any inducement or consideration, such a promise must be fulfilled..."* (404 US at 262). Similarly, in Brady v. U.S. 397 US 742, this High Court held: *"[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by threats...misrepresentations or perhaps by promises that are by their nature improper..."* Further, in U.S. ex rel Baker v. Finkbeiner (1977) 551 F.2d 180 the court stated: *"The correct test to determine whether the circumstances surrounding [the defendant's] negotiated guilty plea violated the Due Process Clause is that the plea must withstand collateral attack unless the sentence actually imposed [on the defendant] significally differed from the sentence which the prosecutor and the trial court promised."* In the case at bar the actual sentence was two years in State prison and $10,000 fine where the approved plea agreement was no incarceration and no fine.

In U.S. ex rel Johnson v. DeRoberts (1982) 541 F.Supp. 547 the court stated: *"Baker establishes that the trial judge is bound to a plea bargain when it participates in the plea negotiations process and ratifies the resulting agreement. A defendant who pleads guilty in reliance on such agreement can not be sentenced to a term longer than he was promised."* The within record clearly reflects that the trial court did participate in the negotiations and ratified the agreement and, therefore, should be required to follow through with it.

California Penal Code §1192.5 states: *"where such a*

plea is accepted by the prosecuting attorney in an open court and is approved by the court, the defendant...can not be sentenced on such a plea to a punishment more severe than that specified in the plea..."

The appellate court erred also in concluding that the trial court questioned the voluntariness of Petitioner's plea (given his protestations of innocence). The appellate court , however, ignored the well established principle that a plea is not involuntary merely because the defendant protests his innocence. Watts court, supra, specifically held that he may enter a plea of guilty even though he protests his innocence. Petitioner's reasons for entering his plea, that he insisted on stating into the record (his poor health and the suffering of his wife and children) clearly indicate his strong desire and motivation to enter that plea which can be interpreted only as a voluntary and intelligent act.

In light of the foregoing, a writ should issue to compell the courts bellow to reverse and adhere to the plea agreement.

2. THE APPEALS COURT WAS REQUIRED TO REVERSE PETITIONER'S CONVICTION SINCE COLLATERAL ESTOPPEL BARRED PERJURY PROSECUTION GIVEN THAT THE ISSUE OF PETITONER'S ALLEGED PERJURY WAS ADJUDICATED IN PETITIONER'S FAVOR IN A PRIOR CIVIL ACTION.

The doctrine of collateral estoppel (CE) precludes an ultimate issue of fact necessarily decided in a defendant's favor in a prior proceeding from being relitigated in a subsequent criminal action against the defendant. U.S. v. Jenkins (1990) 902 F. 2d 459. *The doctrine is applicable to criminal as well as civil proceedings.* Ashe v. Swenson (1970) 397 US 436. *Where successive pleadings are different in nature, one civil and one criminal, collateral estoppel may still bar relitigation of an issue decided in the first action.* People v. Sims (1982) 32 Cal.3d 468. *To successfully invoke CE, a party must demonstrate: a) the issue necessarily decided at the previous hearing is identical to the one which is sought to be litigated; b) the previous proceeding resulted in a final judgment on the merits, and c) the party against whom CE is asserted was a party or in privity with a party to the prior proceeding.* Sims, supra.

In the instant case, Petitioner was charged with making perjurious statements on an application to waive a fee which

was required when he filed an unrelated civil action in 1988. The defendants in that civil case moved to strike Petitioner's complaint alleging that his fee waiver application was perjurious because he had assets. That fee waiver had no bearing whatsoever on those defendants or on Petitioner's case against them. The fee waiver issue was strictly between Petitioner and the court. At the hearing on the Motion to Strike, Petitioner provided *"factors relevant to his financial condition including (1) the fact that he was on medical leave and unable to maintain his employment as an engineer; (2) his medical condition; (3) the pendency of a divorce action with its attendant fees for three and a half years; (4) his loss of savings; and (5) the fact that he was making payments for two residences (mortgage, taxes, insurance and utilities)".* (Clerk's Transcripts, 168).

After reviewing Petitioner's financial records and hearing the evidence, Municipal Judge Hoffman concluded that Petitioner's fee waiver application was truthfull and that he was entitled to the fee waiver. She then denied the Motion to Strike. The representations Petitioner made on said applications for waiver are the subject matter of the two perjury counts herein. Judge Hoffman's ruling in Petitioner's favor was an adjudication on the merits determinative of the identical issue in this case, i.e., that Petitioner did not commit any perjury when he applied for the fee waiver. The perjury charge against Petitioner was filed by another Municipal court judge who was assigned the civil case. The Municipal Court adjudicated the prjury issue in Petitomer's favor and the same court initiated the same perjury charges aginst Petitioner for the same fee waiver application three years later.

The appellate court conclusion that there was no privity among the parties to invoke a bar under the CE doctrine is clearly erroneous. The issue of the alleged perjurios fee waiver application was strictly between Petitioner and the court then, in the civil case, and now, in the instant case which litigated the same issue. The "People" in this case are in fact the alter ego of the court which is the true alleged victim. The court, by Judge Hoffman, who ruled that Petitioner's waiver application was truthfull, had a direct involvement in the proceeding beyond the usual role of adjudicating a dispute between the litigants by reasons of the fact that it was asked to control its own processes under the cited authority. The fact that the court did not present evidence or otherwise participate as a litigant does not defeat the fact that it was in privity. *Failure to*

introduce evidence on the issue involved does not necessarily defeat a plea of collateral estoppel. Teitelbaum Furs Inc. v. Dominion Ins. Co. 58 Cal.2d 607, 375 P.2d 439; Sims, supra. In Sims the defendant was charged with fraudulently obtaining AFDC benefits. In an independent proceeding, the Department of Social Services had held that Mr. Sims did not commit fraud. The California Supreme Court re-affirmed collateral estoppel effect (in Mr. Sims' favor) in connection with the subsequent criminal prosecution.

In Bernhard v. Bank of America, (1942) 19 Cal.2d 807, a beneficiary plaintiff unsuccessfully sued a fiduciary for misappropriation of funds by transfer from one bank to another. Same plaintiff then sued a different party, the bank, for allowing the alleged misappropriation to occur. The court held that the bank could invoke collateral estoppel based on the first suit. In Parklane Hosiery Co. v. Shore (1979) 489 US 382, defendant was held to have violated federal securities laws in a suit brought by the SEC. In a second suit, private plaintiff (a third party) sued same defendant for damages resulting from the same violation established in the first suit. The U.S. Supreme Court allowed the later plaintiff to rely on colateral estoppel to establish the existence of the violation.

In Sims, Bernhard and Parklane the privity between the parties was very remote, almost non-existent in the new, third parties. Yet, the high courts allowed réliance on CE. In the case at bar the privity is clear: the parties are the same, i.e., the Petitioner and the court in. Therefore, Collateral estoppel should have barred Petitioner's later prosecution for the same issue which was already adjudicated in his favor before.

3. THE APPEALS COURT WAS REQUIRED TO REVERSE THE TRIAL COURT'S ORDER IMPOSING A HUGE, $10,000 RESTITUTION FINE IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION AND OF ARTICLE I, SECTION 17 OF CALIFORNIA CONSTITUTION IN THAT THE FINE WAS EXCESSIVE AND THE PUNISHMENT WAS CRUEL AND UNUSUAL AND GROSSLY OUT OF PROPORTION TO THE SEVERITY OF THE CRIME.

At the sentencing hearing, the trial court acknowledged that it was imposing the maximum fine (10,000) allowable "*even though the economic gain* (to Petitioner) *was small...*" ($41). (RT 475.) The appellate court erroneously concluded that by failing to object to the imposition of the fine at trial, Petitioner

waived that issue. A failure to object does not negate the fact that the fine imposed was inversely proportional to the offense and the economic gain therefrom. *The eighth amendment to the Federal constitution which provides that excessive fines shall not be imposed nor cruel and unusual punishments inflicted, applies to the states by virtue of the U.S. Constitution, Fourteenth Amendment.* Robinson v. California (1962) 370 US 660. Article I, §17 of the California Constitution provides for the same protection. *A punishment may violate Article I, §6* [now §17], *of the constitution if...it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."* Re Lynch (1972) 8 Cal. 3d 410. *When punishment is out of all proportions to the offense and is clearly an extraordinary penalty for a crime of ordinary gravity, the courts will denounced it as unusual.* People v. Ladanio (1989) 211 Cal.App.3d 1114.

Punishment is excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than a purposeless and needless imposition of pain and suffering. Carlos v. Superior Court (1983) 35 Cal.3d 131. In determining the proportionality of the punishment to the offense, the court must analyze the *objective factors including: the nature of the offense and the harshness of the penalty, the sentences imposed for more serious crimes in the same jurisdiction, and the sentences imposed for the commission of the same crime in otther juridictions.* Solem v. Helm (1983) 463 US 277. The courts must inquire *on the particular person...and ask whether the punishment is grossly disproportionate to the defendant's culpability as shown by...his age, prior criminality, personal characteristics and state of mind.* People v. Truett (1981) 126 Cal.App.3d 156.

The trial court ignored the reuirements of Government Code §13967 which states: "*In setting the amount of the fine...the court shall consider any relevant factors including...the serious and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime. Those losses may include pecuniary losses to the victim...as well as psychological harm...*" An objective court considering those factors would have imposed a low, symbolic fine particularly since the highly favorable probation officer's report (which described Petitioner as "*a progressive and stable citizen of society and a suitable*

candidate for probation supervision") recommended a $100 fine and no incarceration. *Section 13967 is designed to compensate crime victims for economic losses suffered as a direct result of a crime.* People v. Fritchey (1992) 2 Cal.App.4th 829. It can hardly be shown that the $41 filing fee that Petitioner saved resulted in any significant loss or harm (to anybody, including the county) which would justify such an uncoscionable, large fine that was imposed on him. Clearly, this fine, which the court imposed on Petitioner , was not designed to compensate the victims but to inflict a harsh and cruel punishment on Petitioner, violative of his State and Federal constitutional rights. A large fine such as this would have been appropriate to serious, violent crime resulting in great losses and psychological harm to the victims. None of these factors exists in the case at bar. Therefore, a Writ is justifiable and appropriate in this case.

4. THE APPEALS COURT WAS REQUIRED TO RVERSE PETITIONER'S CONVICTION SINCE THE TRIAL COURT DENIED HIM HIS DUE PROCESS RIGHT TO AN ELIGIBILITY HEARING (PURSUANT TO GOVERNMENT CODE SEC. 68511.3 AND RULE 985(F), CALIFORNIA RULES OF COURT) WHICH IS A CONDITION PRECEDENT TO THE PERJURY PROSECUTION.

In cases in which a substantial evidentiary conflict is discovered concerning applicant's eligibility for in forma pauperis status, GC §68511.3 provides that the applicant has a right to an evidentiary hearing:

> *"The Judicial Council shall provide: (1) for standard procedure for considering and determining applications for permission to proceed in forma pauperis, including, in the event of a denial of such permission, a written statement detailing the reasons for the denial and evidentiary hearing where there is a substantial evidentiary conflict..."* (Emphasis added).

Pursuant to this authority, the Judicial Council adopted certain mandatory rules governing in forma pauperis status. Specifically, Rule 985(f) provides:

> *"If the court determines within five days after the application is filed that there is substantial evidentiary conflict concerning the applicant's eligibility for in forma pauperis status, the clerk shall promptly give the applicant no less than ten days' written notice of a hearing..."* (Emphasis added).

Petitioner was entitled to such hearing prior to revoking his status and prior to prosecuting him for perjury. He was denied

that hearing. In fact, his October 4, 1988 fee waiver was revoked without a hearing (despite mandatory requirements) by Judge Wallerstein on June 11, 1990 in an order handwritten by a clerk, stating: *"Based on information submitted to this file [in the civil lawsuit of Charash v. Freid & Goldsman, 88EO 7973] it has become apparent that Amnon Charash has income and property which renders him ineligible for the fee waiver previously granted. It is therefore ordered that the fee waiver granted 10-4-88 is hereby revoked and that any subsequent filing by fee waiver be submitted accompanied by a new application for waiver and proper identification be shown as required."* (CT 143-144).

The same judge, Wallerstein, immediately after revoking Petitioner's status without the required hearing, ordered a criminal investigation of Petitioner for perjury which resulted in a prosecution in may, 1993, almost five years after the alleged offense was committed (the filing of the fee waiver application). All that, without affording Petitioner with the mandatory eligibility hearing which is a condition precedent to a revocation of his in forma pauperis status and perjury prosecution.

If a court properly follows the law and finds, at a noticed eligibility hearing, that an applicant is able to pay the fee, GC §68511.3 prvides the remedy to be imposed: *"The court may then order the litigant to pay to the county such sum and in such manner as the court believes is compatible with the litigant's financial ability."* The court in the case at bar ignored the law and due process and proceeded to prosecute the Petitioner in violation of his rights.

5. THE APPEALS COURT WAS REQUIRED TO REVERSE PETITIONER'S CONVICTION SINCE THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY IMPROPERLY AND REPEATEDLY APPEALING TO THE JURY'S PECUNIARY INTEREST.

The prosecutor in this case made several intentional references to the fact that the jurors, as taxpayers, would be picking up the tab for Petitioner's alleged attempt to avoid paying filing fee. *Comments made during closing argument must be based on facts established by the evidence.* People v. Deasee (Jan.13, 1994) Daily Journal D.A.R. 522. No evidence was ever introduced at trial that this was in fact true.

The appellate court stated that *"it is not misconduct for the prosecution to comment on the obvious inferences which may*

be drawn from the evidence which are a matter of common knowledge". (Appendix B, p. 16). This is clearly inapplicable in this context in that the "*obvious inferences*" which are a "*matter of common knowledge*" are, in this case, ones which the courts have repeatedly held improper, as will be shown below.

The prejudicial comments made by the prosecutor were:

"[Appellant] does'nt want to pay any money. He does'nt want to pay the filing notices or motion fees or the court cost, all the costs associated with a lawsuit. [Appellant] wants a freebie. He wants the taxpayers to pick it up. So what does he have to do? He has to convince them in this statement right over here, this fee waiver, he has to convince them he does haven't [sic] any money." (RT 347) (Emphasis added). The prosecutor continued to inflame the jury's passion:

"...I don't want you to think that this is no big deal just because we are talking about Mr. Charash getting out of paying $41 at the filing window...We are not here because Mr. Charash took us basically as taxpayers for 40 bucks." (RT 370) *"...And the reason we are here today is not because Mr. Charash got $41 from the taxpayers...because he lied under penalty of perjury."* (RT 372) (Emphasis added.)

These examples are backhand references to the fact that the jurors would be "picking up the tab" and they were clearly designed to inflame the passions and emotions of the jurors as taxpayers. They were clear signals to the jurors that they each would be personally affected by Petitioner's fee waiver.

In People v. Smith (1984) 155 Cal.App.3d 1103, a tax fraud prosecution, the prosecutor commented in closing arguments that every time someone lies or cheats on their taxes it increases the burden on all others. On appeal, the court held that the comments were clearly improper since they appealed to the jury's pecuniary interest. Similarly, in the case at bar the prosecutor's comments that Petitioner "*got $41 from the taxpayers*" were improper in that they clearly appealed to the jury's pecuniary interest and were designed to suggest that the jurors would be personally affected by Petitioner's action.

The vast majority of courts are in agreement as to the impropriety of arguments by prosecutor in a criminal case refering to the fact that the offense charged was directly against the jurors' immediate interest as taxpayers. (See 60 A.L.R.4th 1063, Prosecutor's Appeal IN Criminal Case to Self-Interest or Prejudice of Jurors As Taxpayers As Ground for Reversal, New Trial or Mistrial.)

In U.S. v. D'Anna (2d Cir. 1971) 450 F.2d 1201 the prosecutor in closing argument twice asked the jurors to consider the fact that they as citizens carry an additional burden when someone does not pay his taxes. The appellate court held that such statements were improper and that the prosecutor *"should not be permitted to indulge in oratorical flights that seriously endanger a defendant's right to a fair trial..."* Id. at 1205.

In People v. Smith (1984), supra, the court recognized the improper and prejudicial nature of the prosecutor's comment in the closing argument of a tax case that "*...to the extent that a person lies or cheats or otherwise does not report his true tax liability, that just increases the burden that you and I have as far as meeting the expenses of the Government.*" Id. at 1181.

Similarly, in the instant case, the prosecutor's comments that Petitioner *"got $41 from the taxpayers"* were improper in that they appealed to the jury's pecuniary interest and were designed to suggest that the jurors would be personally affected by Petitioner's actions. Clearly, these comments constitute prosecutorial misconduct, violative of Petitioner's due process rights under the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, §7 of the California Constitution.

6. THE APPEALS COURT WAS REQUIRED TO REVERSE PETITIONER'S CONVICTION SINCE HIS TRIAL COUNSEL'S FAILURE TO MAKE A MOTION BASED ON DISCRIMINATORY PROSECUTION AS PROVIDED FOR IN MURGIA V. MUNICIPAL COURT (1975) 15 CAL.3d. 286 CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 15 OF CALIFORNIA CONSTITUTION.

"A criminal defendant has a right to an effective assistance of counsel under the Sixth Amendment which applies to the states by virtue of the Fourteenth Amendment." Cuyler v. Sullivan (1980) 44 US 335. This right is also guaranteed by the California Const., Article I, §15. *"...a defendant may prove such ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failing."* People v. Fosselman (1983) 33 Cal.3d. 572.

Petitioner contends that his trial counsel had a duty to

perform certain tasks and take certain actions during the corurse of this case but he failed to do them. Petitioner would not have sustained the conviction but for his counsel's failure to act. Among these omissions were: (a) counsel never received discovery and never filed a discovery motion despite Petitioner's requests (b) counsel never raised any objections at trial and failed to object the introduction of inadmissible evidence (c) he never investigated evidence nor interviewed any prosecution witnesses (d) as the appellate court pointed out, counsel failed to object the large fine imposed and the prosecutorial misconduct, and failed to demand an eligibility hearing (Appendix B, pp. 9, 15) (e) counsel never developed an adequate defense at trial, failed to introduce crucial defense evidence and failed to complete direct and cross-examinations (f) he failed to file a crucial motion to dismiss on grounds of discriminatory prosecution despite overwhelming evidence of such discrimination and being instructed to file such motion by the judge who heard Petitioner's earlier motion to dismiss. It has been quite clear to those who are familiar with this case that Petitioner's trial counsel was under political pressure not to present too vigorous a defense (at one point during the trial he screamed at Petitioner who demanded action: "*I still have to continue to appear in this courthouse long after you are gone*!").

Petitioner contends that he was discriminatorily selected for prosecution and his counsel had the duty to file a pre-trial motion to dismiss pursuant to Murgia v. Municipal Court (1975) 15 Cal.3d. 286. The overwhelming evidence would have been sufficient to sustain that motion. Said evidence would have included (a) the court's choosing to prosecute Petitioner for perjurty instead of conducting a mandatory hearing to determine his eligibility for the fee waiver (discussed above) (b) the entrapment of Petitioner by the court personnel inducing him to file a second, unnecessary, fee waiver application which was later used to prosecute him, and (c) the fact that Petitioner was the only person ever prosecuted for perjury on a fee waiver application (according to county court statistics).

Regarding the entrapment, the record leaves no doubt that in fact a trap was set for Petitioner to have him complete a second fee waiver application when it was realized that the first application was not sufficient to bring charges against him. This was acknowledged by the prosecutor in his opening statement where he states that the parties involved wanted to

make sure that they ask for Petitioner's identification to create a criminal case against him. Specifically, the prosecutor explains:

"The reason for that second application is because the court became pretty suspicious when they found out what was going on and they wanted defendant to fill out another fee waiver application about a year and a half later. And so they gave him another one to fill out with the instructions to the clerk's office that, 'Hey, listen. When this guy comes in again, have him fill this form out again and get a driver's license from him so we know who it is so there is no question when it comes down to court who we are talking about.'" (RT 23.) (Emphasis added.)

A review of the record shows that Petitioner's counsel was aware of the "Murgia" (discriminatory prosecution) problem prior to trial as he refered to it in his motion to dismiss for insufficient evidence (Penal Code §995). At the hearing on said motion, the court stated: *"Well, on Murgia, I don't think that can be handled basd on the record that you have here. The discriminatory prosecution really isn't fully developed factually in a preliminary hearing transcript. If you want to pursue this one you have to do it with an independent motion."* (TR A-7.)

Had counsel properly filed the Murgia Motion as he should have, it would have revealed the fact that (a) Petitioner was the only person ever prosecuted (In Los Angeles County) for perjury on a fee waiver application, and (b) only 148 cases (out of more than 300,000 cases filed during the six years preceeding this case) were perjury cases and all 148 cases were for welfare and driver's license application fraud. Said motion would have also shown the vindictive and prejudicial actions taken against Petitioner by court and D.A. personnel to ensure his conviction. Those actions were clearly in violation of the Equal Protection and Due Process Clauses of the Federal Constitution.

The appellate court acknowledged that *"the law may afford appellant the right to a hearing* [regarding Petitoner's ability to pay restitution fine] *but it does not require a hearing unless he asks for it."* (Appendix B, pp.9-10.) It concluded that Petitioner waived the issue by failing to request such hearing at the time of sentencing. (Id.) The appellate court, however, failed to address Petitioner's argument that trial counsel's failure to request such hearing constituted ineffective assistance of counsel.

The ineffective assistance of Petitioner's trial counsel violated his Sixth Amendment right and prejudiced him. The

above evidence is quite sufficient to support a reasonable probability that, but for counsel's failure to make the motion pursuant to Murgia, supra, and his other failures to act (as outlined above), the outcome of this case would have been more favorable to Petitioner.

CONCLUSION

The foregoing clearly demonstates that the opinion of the Court of Appeals conflicts with this Court's established holdings of the footnote-listed cases and that Petitioner's equal protection, due process, Fifth, Sixth, Eighth and Fourteenth Amendment rights have been violated. For the reasons set forth above, this Court should grant a Writ of Certiorari to resolve the conflict created by the judgment and opinion of the Court of Appeals in this matter.[1]

Dated: May 24, 1995

Respectfully submitted,

Amnon Charash

AMNON CHARASH
Petitioner In Pro Per

[1] If this Court elects not to address the issues presented in this writ at this time, it is respectfully requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions in Santobello, supra, Brady, supra, Jenkins, supra, Ashe, supra, Parklane Hsiery, supra, Robinson, supra, Solem, supra, D'Anna, supra, and Cuyler, supra.

APPENDIX

APP. A: California Supreme Court Denial of Petition

Second Appellate District, Division Two, No. B077058
S044226

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

AMNON CHARASH, Appellant

SUPREME COURT
FILED

MAR 1 1995
P. QUINN
Deputy

Appellant's petition for review DENIED.

(LUCAS)
Chief Justice

APP. B: Opinion of California Court of Appeals

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent,	)	B077058 (Super. Ct. No. LA088716)
v.	)	COURT OF APPEAL - SECOND DIST. FILED DEC 02 1994 Joseph A. Lane Clerk
AMNON CHARASH, Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Amnon Charash, in pro. per., Hanson & Egers and Mitchell W. Egers for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Seniot Assistant Attorney General, Jaime L. Fuster, Assistant Supervising Deputy Attorney General, and Joseph P. Furman, Deputy Attorney General, for Plaintiff and Respondent.

Amnon Charash was charged with two counts of perjury and one count of altering documents in a court file. (Pen. Code, § 118; Gov. Code, § 6201.) A jury found him guilty as charged. Appellant was sentenced to the low term of two years in state prison, and ordered to pay a $10,000 restitution fine. (Gov. Code, § 13967.) We affirm.

FACTS

The Perjury Charges

In connection with a civil suit he filed against his former attorneys, appellant filed two applications seeking a waiver of court fees and costs. Both applications were signed by appellant under penalty of perjury.

In his first application for a fee waiver, dated October 4, 1988, appellant wrote that his gross monthly income was $900. Above his signature, appellant stated that he was "penniless" (sic), " unemployed," and unable to afford three full meals a day because he was subsisting on state disability and supporting his family. Appellant did not acknowledge that he owned any assets such as cash or real or personal property. His application for a fee waiver was granted and he was allowed to file his complaint at no cost.

The 1988 fee waiver was subsequently revoked. Appellant then submitted a new application on June 27, 1990. In this second application, appellant once again represented

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that he was unemployed and lacked the income to pay for the necessities of life. This application for a fee waiver was denied.

The evidence showed that at the time appellant filed his first application for a fee waiver, he possessed substantial financial assets. Appellant owned: a partnership interest in a profitable mini-mall in Van Nuys since about 1980; a home in Van Nuys held in the name of his father; a $272,000 home in Sherman Oaks; condominiums in Israel and Santa Monica; IRA accounts; $15,000 in municipal bonds; a 1985 Cadillac Seville; and Swiss and American bank accounts

Documentary evidence revealed that the partners in the Van Nuys mini-mall became entitled to a distribution in early 1988. They agreed in writing that appellant could leave his $16,156 share of the distribution in the partnership checking account until such time as he wished to withdraw the monies. In March of 1989, appellant submitted a mortgage load application to a bank indicating that he had been employed as a real estate agent for the last two years, wand had a net worth of over half a million dollars. Appellant also worked for the Amnon Charash Investment Management Company, which received income for managing the affairs of the Van Nuys mini-mall.

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In a divorce judgment in November of 1989, six months

before filing his second application for a fee waiver, appellant was awarded a $40,000 equalizing sum, in addition to receiving all the couple's rights and interest in the mini-mall, the Santa Monica condominium, the Cadillac, the municipal bonds, the IRA accounts, and half the interest in the Swiss bank account and the real property in Israel.

Altering A Court Document

On May 29, 1990, appellant went to the court clerk's office and asked to see a motion he had previously filed in his civil case against his former attorneys. The deputy clerk told appellant that he could not add to or subtract from the motion because it was already filed with the court.

Appellant took the document with him into a viewing room. Shortly afterwards, the clerk looked into the room and saw appellant writing on the motion. She called over a nearby colleague to observe appellant's activity. A supervisor then confronted appellant, who denied writing on the motion. A subsequent comparison of the motion that was filed with the court and the copy of the motion served on opposing counsel revealed that the court's copy had additional writing on page 11, plus three additional handwritten pages.

DISCUSSION

1. Sufficiency of the Evidence

Appellant contends that his perjury convictions were improperly based on gratuitous, immaterial statements he made on his fee waiver applications relating to his lack of employment and impoverished state.

The statements appellant wrote on his applications were plainly designed to convince the court that appellant was in dire financial straits, and even lacked the wherewithal to afford proper nourishment. While appellant's statements may well have been gratuitous insofar as they were unsolicited, they certainly were not immaterial as they had a direct bearing on his ability to afford court costs, which was the entire reason for filing the application. Apart from appellant's gratuitous but material statements relating to his purported poverty, the applications contained other material falsehoods which sustain his perjury convictions. Unlike the defendant in People v. French (1933) 134 Cal.App. 694, who simply omitted

information relating to his financial position, appellant affirmatively misrepresented his financial position in his fee waiver applications.

Appellant affirmatively understated his income, wrongly stated that he was unemployed when in fact he was employed, and misrepresented that he could not afford the

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necessities of life at a time when he possessed significant financial assets.

The evidence established that appellant was employed by his eponymous management company, which earned a monthly fee of about $8,000 for handling the affairs of the mini-mall appellant co-owned. His assertion that managing the mini-mall and receiving payment for his work did not constitute "employment" is ridiculous. "Employment" is defined as an "activity in which one engages," usually for remuneration. (Webster's New Internat. Dict. (3d ed. 1981) p. 743, col. 3.) In addition, appellant's 1989 mortgage application revealed that appellant, by his own admission, was employed at Mike Glickman Realty as a broker from 1987 through 1989 , and that he earned several thousands dollars a month in commissions from this employment. Appellant's assets were revealed at trial to be very significant, encompassing numerous valuable parcels of real property. In the 1989 mortgage load application, signed under penalty of perjury, appellant valued his own holdings at $682,300 and claimed a gross monthly income of $5,300.

In short, the jury's verdicts that appellant twice committed perjury on his applications for a fee waiver are supported by substantial evidence. The jury could reasonably conclude that appellant greatly understated his income on his

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first application, and falsely claimed he lacked money to pay for the necessities of life in his second application.

As a separate issue, appellant contends that his conviction for altering a court document was improperly based on circumstantial evidence. Direct evidence proves a fact immediately, without an inference or presumption, such as when a witness sees the defendant commit a crime. Circumstantial evidence proves a fact indirectly by inference and deduction. (People v. Goldstein (1956) 139 Cal.App.2d 146, 152-153; 1 Witkin, Evidence (3d ed. 1986) § 284.)

The case against appellant was established with direct

evidence, not with circumstantial evidence: a deputy court clerk observed appellant committing the crime of altering a court file. Though appellant denied this act, and claimed he was writing on a piece of paper, additional evidence --a comparison of the document in the file and the document served on opposing counsel-- established that the court file contained new material which the documents counsel received lacked, three pages worth of material, in fact, plus some new written matter on one of the existing pages. The jury chose to believe the testimony of the court clerks, and to disbelieve appellant. That determination will not be reweighed here.

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2. Authority of Person Receiving Fee Waiver Applications

Appellant argues that his convictions cannot be sustained because the representations in his fee waiver applications were not made to a "competent tribunal, officer, or person." (Pen. Code, § 118.) He reasons that the law clerk who may have stamped or reviewed his applications did not qualify as a competent tribunal, officer, or person.

There was a some testimony that a law clerk may have applied a judge's stamp to fee application waivers after they were reviewed and approved. However, there is no reason to believe that the task of simply stamping the documents was not performed at the discretion and behest of the trial court after it read and approved the applications. Because the law presumes that an "official duty has been regularly performed" (Evid. Code, § 664), and this presumption was not refuted by evidence showing that the trial court failed to review the applications, appellant's attack on the authority of the person granting the waiver fails.

3. Denial of Eligibility Hearing

Appellant asserts that he should have been subject only to an eligibility hearing relating to his financial status, not to a perjury prosecution.

As respondent correctly notes, provisions in the Government Code and Court Rules relating to hearings on one's

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eligibility to proceed in forma pauperis do not foreclose a criminal proceeding when there is probable cause to believe an applicant committed perjury. The fact that some statutes merely impose a civil penalty (i.e., revocation of status as an indigent litigant) does not prevent the government from

enforcing criminal laws barring people from lying while under oath. (People v. Hwang (1994) 25 Cal.App.4th 1168, 1178.) The two options open to the government are not mutually exclusive. Whether the proper procedures for the civil penalty --such as notice and a hearing-- were provided to appellant before his status as an indigent litigant was revoked does not affect the outcome of this criminal perjury matter in any way.

4. Imposition of $10,000 Fine

The imposition of a $10,000 restitution fine constitutes cruel and unusual punishment, appellant contends, because it is disproportionate to his crimes and shocks the conscience considering that his conduct only deprived the County of $41. As a separate issue, appellant also contends that the trial court erroneously failed to consider his ability to pay.

Appellant waived these issues by failing to object to the imposition of the fine at trial or ask for a hearing on his ability to pay. The law may afford appellant the right

to a hearing, but it does not require a hearing unless he asks for it. (People v. Walker (1991) 54 Cal.3d 1013, 1029; People v. Menius (1994) 25 Cal.App.4th 1290, 1299; People v. Geddes (1991) 1 Cal.App.4th 448, 457.)

Even if a timely objection had been made, there would still be no grounds for reversal. Government Code section 13967 allows the imposition of a restitution fine ranging from $200 to $10,000 where the defendant is convicted of one or more felony offenses. In determining the fine, the court may consider "any relevant factors," including but not limited to such things as the gravity of the offenses, the circumstances of their commission, and the economic gain derived by the defendant. The trial court in this case voiced strong opinions about the egregiousness of appellant's conduct, about his repeated and unrepentant pattern of lying under oath not only in the fee waiver applications in which he forgot to list all of his assets but in his unbelievable testimony to the jury as well. The court pointed to appellant's unfounded accusations that court personnel lied on the witness stand because he had complained about them. The court also observed that appellant cheated the taxpayers. These factors are all relevant to the issue of whether appellant should be fined for deceiving the judicial system in three separate instances.

The court's imposition of a fine will not be disturbed unless

there is a clear abuse of discretion. (People v. Derello (1989) 211 Cal.App.3d 414, 427.) In light of appellant's unabated tendency to lie under oath in order to secure advantages for himself, heedless of its effect on other individuals and society, there was no abuse in imposing the maximum fine, especially considering the ample financial assets which the evidence at trial revealed.

5. Ineffective Assistance of Counsel

Appellant urges that reversal is mandated by his trial counsel's failure to assert a claim of discriminatory prosecution. According to appellant, he was discriminated against because of his "abrasive personality" and because the court and district attorney were conducting a vendetta against him, which is evidenced by the fact that he was the only person to be prosecuted for perjury on a fee waiver application over a period of several years.

Appellant cites Murgia v. Municipal Court (1975) 15 Cal.3d 286 in support of his position. For a defendant to establish discriminatory prosecution in violation of the equal protection clause, Murgia requires that the defendant prove (1) that he was deliberately singled out for prosecution on the basis of some invidious criterion; and (2) that the prosecution would not have occurred but for the

prosecutor's discriminatory design. (People v. Superior Court (Hartway) (1977) 19 Cal.3d 338, 348.) "In other words, a criminal prosecution which results from the prosecutor's intent to punish a defendant for belonging to a class or exercising rights protected by the equal protection clause cannot be sustained." (People v. Smith (1984) 155 Cal.App.3d 1103, 1133.) Invidious criteria under the equal protection clause include race, religion, national origin, or other arbitrary (i.e., without legal cause) classification. (Murgia v. Municipal Court, supra, 15 Cal.3d at pp. 290, 302.)

Disliking an abrasive personality does not qualify as an invidious criterion under the equal protection clause. If disliking the personalities of criminal defendants could form the basis for a claim of class-based animus, no prosecutions would ever occur because criminal defendants are frequently unlikable. In addition, the equal protection clause is not offended merely because people are not often prosecuted under certain statutes. Some crimes, such as this one, are more difficult to detect than others.[1/] The state cannot be foreclosed from

prosecuting a violation which does come to

1/ It appears that appellant's former divorce attorneys, whom appellant has sued, brought appellant's deceit to the court's attention after appellant filed the fee waivers in his suit against them. The testimony at trial showed that the government does not generally investigate the statements made in fee waiver applications.

light even if revelation of that particular crime is rare. To conclude otherwise would void legitimate laws.

Because appellant has no basis for claiming a violation of the equal protection clause, his trial counsel was not remiss in deciding that a motion asserting discriminatory prosecution would be fruitless, time-consuming and of little value to his client. (In re Lower (1979) 100 Cal.App.3d 144, 149, fn. 3.) Further, trial counsel's failure to object to the admission of appellant's handwritten statements on his fee waiver applications that he was penniless, unemployed and undernourished was not in error: as discussed in the first section, supra, these statements were material to the issue of whether a fee waiver should be granted.

6. Instructional Error

Appellant's attack on the constitutionality of the reasonable doubt instruction was resolved against appellant in Victor v. Nebraska (1994) ___ U.S. ___ [114 S.Ct. 1239].

7. Refusal to Accept Plea Bargain

Appellant asserts that the trial court improperly refused to accept a plea bargain because it was irritated and annoyed by appellant's remarks to the court.

While plea bargaining is an accepted and beneficial practice, it does not rise to the level of a constitutional

or statutory right. (Wells v. Municipal Court (1981) 126 Cal.App.3d 808, 812.) The court may refuse to accept a plea, absent an abuse of discretion. (People v. Snyder (1989) 208 Cal.App.3d 1141, 1146.)[2]/

There was no abuse of discretion in this case. Appellant's counsel informed the court that appellant wished to enter a nolo contendere plea. The court then asked the prosecution to "proceed," meaning to state the terms of the agreement. By asking the prosecution to proceed, the court was not assenting to the agreement because it did not yet know

what the agreement was, contrary to appellant's assertions. When the prosecutor asked appellant if he would plead no contest, appellant said yes, then adamantly denied his guilt and asserted he was only agreeing to the plea because of his health and his family.

Apparently, the court questioned the voluntariness of appellant's plea, given his protestations of innocence and his suggestion that he felt compelled to plead. Though such protestations do not render a plea involuntary per se, the

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2/ The cases cited by appellant hold that a plea bargain, once approved by the court, is binding on all parties unless the defendant's assent was obtained by threats or misrepresentations. Those cases are inapposite because in this instance, the plea bargain was never approved, so holding the court or prosecution to its deal is not at issue.

trial court was still not compelled to accept the plea. (North Carolina v. Alford (1970) 400 U.S. 25, 31-39; People v. Snyder, supra, 208 Cal.App.3d at p. 1147.) Indeed, the court gave appellant yet another chance to plead out, just before trial. However, when the court asked appellant if he was going to plead guilty, appellant indicated through counsel that he "wished to make a statement." The court replied that the correct answer was "yes" or "no" and not to make a statement. Appellant did not respond. The court's reservations about accepting a guilty or nolo plea from appellant were well founded.

8. Prosecutorial Misconduct

Appellant states that the prosecutor improperly appealed to the jury's pecuniary interest. Though appellant waived this issue by failing to object at trial, his contention on appeal lacks merit in any event. The prosecutor twice emphasized in closing argument that the jury was not there because appellant deprived the taxpayers of $41. It is clear from the context of the remarks that the prosecution feared the jury would acquit appellant because of the trivial amount of money appellant avoided paying on account of his perjury. As for the prosecution's argument that appellant was trying to get a "freebie" by cheating the taxpayers, that is in fact the only conclusion which may be

drawn from appellant's filing of a fraudulent fee waiver

application. It is not misconduct for the prosecution to comment on the obvious inferences which may be drawn from the evidence which are a matter of common knowledge. (People v. Sassounian (1986) 182 Cal.App.3d 361, 396.)

9. Collateral Estoppel

Appellant asserts that he could not be criminally prosecuted for perjury because a judge in appellant's civil case against his former attorneys ruled against the attorneys when they moved to strike on the grounds that appellant's fee waiver application was false. Appellant reasons that this civil ruling resolved the issue of his truthfulness on the applications.

Collateral estoppel bars relitigation of an issue if the party against whom the estoppel is asserted was a party or in privity with a party to the prior proceeding. (People v. Sims (1982) 32 Cal.3d 468, 484.) The district attorney's office and appellant's former divorce attorneys are not remotely in privity with each other, nor do they have a unity of interests. Therefore, collateral estoppel does not bar this criminal action. Appellant's effort to rationalize that the trial court was a "party" to both the civil and criminal actions simply does not fly.

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10. Entrapment

Appellant asserts that he was "trapped" into filing the second fee waiver application. The evidence established that at the time the trial court rescinded the first fee waiver, it advised appellant that he needed to file a new application if he wished to proceed in forma pauperis. The judge may or may not have spoken to the district attorney's office regarding this matter prior to rescinding the first waiver. In any event, at the time the second application was filed, the clerk's office made a copy of appellant's driver's license to ensure his identity.

The court's advice that appellant would have to file a new application if he wished to secure a further fee waiver did not amount to entrapment. Entrapment occurs when the conduct of a law enforcement agent is likely to induce a normally law-abiding person to commit an offense. Official conduct which only offers an opportunity to the person is permissible. What is impermissible is "for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (People v. Barraza (1979) 23 Cal.3d 675, 689-690.)

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The trial judge is not a law enforcement officer. Nor was there any evidence that the judge was acting as an agent of the district attorney's office: the court clerk who testified at trial simply did not know what the deputy district attorney and the judge discussed. More to the point, appellant was not badgered, cajoled, or importuned to engage in illegal conduct. Rather, he was presented with opportunity to file a second perjurious application, and he chose to avail himself of that opportunity without any coaxing at all. He was not entrapped.

11. Sentencing

Appellant contends that there was no rational basis for the prison sentence imposed by the court. He theorizes that the court based its sentence on his unproven "bad acts" and argues that his crimes were not ones that merited a prison term.

In sentencing appellant to the low term of two years, the trial court listed as a decisive factor appellant's lack of remorse and his unreformed habit of lying, even on the witness stand, which indicated to the court that appellant would not benefit from probation.

A defendant's remorsefulness is specifically enumerated as a factor in determining whether to grant or deny probation. (Cal. Rules of Court, rule 414(b)(7); People

v. Kronemyer (1987) 189 Cal.App.3d 314, 366.) The probation report and supplemental report to which appellant points, which recommend probation, are advisory and the court was not constrained to follow them. (Ibid.) Appellant also displayed an indifferent attitude toward his crimes throughout the trial, another factor militating against probation. (People v. Delson (1984) 161 Cal.App.3d 56, 62.)

Committing perjury on the witness stand may be considered in fixing punishment because it reflects on a defendant's character and prospects for rehabilitation. (People v. Redmond (1981) 29 Cal.3d 904, 913.) Appellant was plainly willing to lie on the witness stand –offering detailed but outlandish reasons for his conduct– in order to avoid being convicted of lying under penalty of perjury. Appellant did not seem to appreciate that, at some point, he needs to stop lying to the court. It was not an abuse of discretion for the trial court to conclude that a prison stint might be the only way to drive this point home to appellant. There is no indication that the trial court used this factor to increase appellant's sentence. Indeed,

the court imposed the low term. Rather, appellant's untruthfulness on the stand was only used by the court as a reason to deny probation. No resentencing is required.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

(Boren)
BOREN, P.J.

We concur:

(Fukuto)
FUKUTO, J.

(Nott)
NOTT, J.

APP. C: Trial court Judgment (Miute Order)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date June 13, 1993 Dept. NWS
HONORABLE Darlene Schempp G. Covey Deputy clerk
301 G. Fenner Deputy Sheriff G. Gorkos Reporter

Case no. LA008716-01
People State of California Deputy District Atty: R. Schuit
vs.
01 CHARASH AMNON Counsel for Defendant: B. HILL PVT
01 CARASH AMIE
Charge 118 002cts G6201 001cts X 147337

NATURE OF PROCEEDINGS P&S REM 06-25-1992
PROBATION DENIED/SENTENCE IMPOSED AS FOLLOWS:
IMPRISONED IN STATE PRISON FOR TOTAL OF 2 YEARS
PAY $10,000 RESTITUTION FINE PURSUANT TO §13967(A) TO THE STATE VICTIMS RESTITUTION FUND.
DEFENDANT GIVEN TOTAL CREDIT FOR 39 DAYS IN CUSTODY (26 DAYS ACTUAL CUSTODY 13 DAYS GOOD TIME/WORKTIME.
COURT ADVISES DEFENDANT OF HIS APPEAL/PAROLE RIGHTS.
DEFENDANT TO PAY COSTS OF PROBATION SERVICES IN THE AMOUNT OF $428 (For Probation Reports.)
DEFENDANT IS REFERRED TO THE TREASURER/TAX COLLECTOR FOR FINANCIAL EVALUATION.
As to COUNT 2, the Court selectsLOW term of 16 months to run concurrent with the sentence in COUNT 1. As to COUNT 3, the Court selects the LOW term of 2 years to run concurrent with the sentence in COUNT 1. The Court states its factors in mitigation as reflected in the notes of the Court Reporter.
COURT SELECTS THE LOW TERM OF 2 YEARS/MONTHS FOR THE BASE TERM AS TO COUNT 1.

6-14-93

(CONTINUED FROM PAGE ONE.)
Defendant's Motion For A New Trial is DENIED.
Defendant's Motion For Bail On Appeal is DENIED.

REMANDED

MINUTES ENTERED
MINUTE ORDER 06-14 93
County clerk

APP. D: Pertinent Text of Constitutional Provisions/Statutes

Federal Constitution:

Fifth Amendment: *"No person shall...be deprived of life, liberty, or property, without due process of law;..."*

Sixth Amendment: *"In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense."*

Eight Amendment: *"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."*

Fourteenth Amendment: *"...nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."*

California Constitution:

Article I, Sec. 7: *"A person may not be deprived of life, liberty, or property, without due process of law..."*

Article I, Sec. 15: A defendant in a criminal proceeding has a right to have an assistance of counsel for his defense. (consistent wuth the 6th Amend.)

Article I, Sec. 17: No excessive fines shall be imposed nor cruel and unusual punishment inflicted. (consistent with the 8th Amend.)

Federal Statutes:

Title 28 U.S.C. §1257(a): *"Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, priviledge, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any cimmission held or authority exercised under, the United States."*

California Penal Code:

Section 995: *(a)...the indictment or the information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:..(2)...(B) That*

the defendant had been committed without reasonable or probable cause."
[Texts of the other statutes are in the body of the ARGUMENT]

APP. E: Pertinent Quotations (from portions of the record)

The following describes the trial judge's and the prosecutor's accepting of the plea agreement and the judge's reneging on it. This occurred after the judge already approved the agreement and Petitioner was brought in to put it on the record:
[APP.1]:
The Court: *"Mr. Hill, your client wishes to enter a plea to–"*
Mr. Hill: *"To enter a plea of no contest* ***under People v. West*** *to Count II."*
The Court: *"Are you willing to accept it under those terms, Mr. Schuit?"*
Mr. Schuit [the Prosecutor]: ***"I am."***
The Court: ***"You may proceed."***
MR. Schuit: *"Mr. Charash, your lawyer tells me you want to enter a plea of no contest to Count II of the information. That is a violation of section 6201 of the California Government Code, commonly referred to as unlawfully destroying, mutilating, defacing, altering or falsifying a record, document or paper that's contained in the court file. Is that what you want to do, to enter a plea of no contest to that charge?"*
Defendant: ***"The answer is yes. And the reason for it, I just want to end it the misery because of my health situation, the misery of my children and my wife. And even though I did not do what I was accused of, I never altered any –"***
The Court: *"All right.* ***He's denying his guilt. I don't want to hear anymore of this.*** *Call the jury clerk. Get the jury up. Get him in a suit. I am tired hearing this misery of everything. You have an ex-wife. You have two children self-supporting. So don't con the court. Get his suit on."* (RT 10.)(Emphasis added)
[The fact that the judge had personal information about the Petitioner before the trial even started is very disturbing. The Petitioner, who is remarried, did have a wife when he made the above statement so he never "conned" the court.]

The Petitioner attempted to enter the plea again after the jury was admonished pursuant to the previously-approved agreement, but the trial court again refused:
[APP. 2]:
The Court: *"...Mr.Hill, you indicated your client wishes to enter a*

plea of guilty; is that correct?...Is there going to be a plea of guilty?"
Mr. Hill: *"Mr. Charash indicated he wished to make a statement to the court."*
The Court: *"I don't want to hear any statements. I want to know if he wants to enter a plea of guilty. That's a 'yes' or 'no'..." All right, gentlemen. Would you clear out that section. We will have the jurors brought in and I will need the jury box, please."*
Mr. Hill: *"Mr. Charash indicated that he wishes –"*
The Court: ***"It is too late."*** (RT 14.) (Emphasis added.)
[Petitioner never had a chance to respond nor any other chances in that court]